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September 13, 2002

Via Hand Delivery
Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Applications of Ameritech Corp. and SBC Communications, Inc.*,
CC Docket No. 98-141

Dear Ms. Dortch:

Enclosed for filing in the above-referenced matter please find an original plus four copies of the Opposition of SBC Communications Inc. to Z-Tel's Petition to Extend Merger Conditions.

I have also enclosed an additional copy for date-stamp and return in the self-addressed envelope provided. Thank you for your assistance in this matter.

Yours truly,

Michael K. Kellogg

Michael K. Kellogg
Bom

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	)	
	)	
AMERITECH CORP.,	)	
Transferor,	)	
	)	
AND	)	
	)	
SBC COMMUNICATIONS INC.,	)	CC Docket No. 98-141
Transferee,	)	
	)	
For Consent to Transfer Control of	)	
Corporations Holding Commission Licenses	)	
And Line Pursuant to Sections 214	)	
And 310(d) of the Communications Act	)	
And Parts 5, 22, 24, 25, 63, 90, 95 and 101	)	
of the Commission's Rules.	)	

OPPOSITION OF SBC COMMUNICATIONS INC. TO Z-TEL's PETITION TO EXTEND MERGER CONDITIONS

Z-Tel's petition to extend the SBC/Ameritech merger conditions should be dismissed. For all its inflammatory rhetoric, Z-Tel's petition has no foundation in law, fact, or sound policy.

First, Z-Tel asks for relief that the Commission has no power to grant. The merger conditions were a set of voluntary commitments with a specific sunset date. They were agreed to by SBC/Ameritech in exchange for approval of its merger. As such, they cannot be unilaterally extended by the Commission. SBC and Ameritech decided to proceed with the merger only after these conditions were established and approved. The Commission cannot change the rules of the game *post hoc*. Nor can the Commission, at this late date, accept Z-Tel's invitation to re-think from scratch "the current public

interest benefits of the merger." Petition to Investigate the Public Interest Benefits of the Transfer and To Toll the Expiration of Certain SBC/Ameritech merger Conditions Pending Investigation at 10 (FCC filed Sept. 3, 2002) ("Z-Tel Pet.")

Second, Z-Tel's argument is, in any event, based upon distortions, misrepresentations and factual inaccuracies. SBC's overall record of compliance with the merger conditions has been excellent. SBC has been found by the Commission to violate the merger conditions in only two, relatively minor instances, each of which resulted in a fine of less than $100,000. Both involved primarily matters of interpretation and were promptly corrected by SBC. Moreover, none of the feared harms of the merger has materialized. In fact, real benefits have been realized, not least of which are robust and growing local competition and the implementation of uniform and enhanced OSS throughout SBC's service territory.

Finally, wholly apart from the legal and factual issues, extending the merger conditions would be bad public policy. Using merger conditions as a substitute for regulation is fraught with difficulties, as the current Chairman has recognized. To the extent the Commission believes that a particular rule is appropriate, it should raise the issue in a rulemaking proceeding applicable to the industry as a whole and subject to judicial review, rather than perpetuate a set of company-specific restrictions that were the bargained-for price of obtaining a merger approval.

I. Z-TEL'S PROPOSAL FOR A UNILATERAL EXTENSION OF THE MERGER CONDITIONS WOULD BE UNLAWFUL

As the Commission itself recognized, the merger conditions were "voluntary commitments" on the part of SBC/Ameritech. Memorandum Opinion and Order, Application of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act, 14 FCC Rcd 14712, 14716, ¶ 1 (1999) ("Merger Order"). True, the Commission at that time indicated that it would not have approved the merger without these commitments. But that does not make the commitments any less voluntary, nor does it provide the Commission with any basis for unilaterally extending those commitments. The terms of the bargain between SBC/Ameritech and the Commission cannot be unilaterally altered by the Commission based on a new "review and investigation of the current public interest benefits of the merger," Z-Tel Pet. at 10, anymore than SBC could unilaterally alter the conditions based on its own current views.

Under paragraph 69 of the merger conditions, which Z-Tel inexplicably fails to mention, the Chief of the Common Carrier Bureau is given authority (in appropriate circumstances and subject to review by the full Commission) to extend the effective period of a *particular* merger condition based on a failure to comply with that condition.[1] Merger Order, 14 FCC Rcd at 14746-47, ¶ 69. But the conditions do not provide the Bureau Chief or anyone else with authority to extend all the conditions based on generalized allegations that "the public interest benefits of the Conditions have failed to materialize." Z-Tel Pet. at ii.

II. SBC HAS COMPLIED WITH THE MERGER CONDITIONS

Even if the Commission did have the authority to extend the merger conditions, there would be absolutely no basis for doing so. The merger conditions were designed in large part to ensure open local markets. At the end of the day, the best proof that SBC has implemented those conditions lies in the substantial in-roads made by competitors in SBC's territory since the merger closed. Based on an extrapolation from interconnection trunks, as of June 2002 CLECs served more than 14 million business and residential access lines in SBC/Ameritech's local exchange service area, or 22% of the total.[2] In many of the Ameritech states, this percentage was even higher. For instance, CLECs had captured 25% in Illinois, and 28% in Michigan. Even using a more conservative methodology based on the E911 database, CLECs serve more than 10 million access lines in SBC territory – or 17% of the total. This explosion of competition is proof positive that SBC's markets are fully open to competitive entry and that SBC has taken with the utmost seriousness its obligations under the merger conditions and the 1996 Act.

Ignoring such inconvenient facts, Z-Tel claims that SBC "has been able to stall and delay competitive entry in a region that accounts for approximately 40% of the nation's telephone access lines . . . [by] repeatedly violat[ing] the commitments it made to the Commission." Z-Tel Pet. at 8, 11. In fact, SBC's overall record of compliance with the merger conditions is excellent. *See* SBC/Ameritech Merger Conditions 2001 Compliance Report to the FCC (Mar. 15, 2002). Despite the number and stringency of

[1] The Commission subsequently delegated this authority to the Enforcement Bureau. See Order, Delegation of Additional Authority to the Enforcement Bureau, 17 FCC Rcd 4795 (2002).

[2] Because it does not have access to an exact accounting of access lines served by CLECs in its local service areas, SBC must estimate the number of CLEC access lines. The first set of estimates in text are based on an extrapolation of CLEC interconnection trunks, using a ratio of 2.75 lines per trunk. Another way to estimate CLEC access lines, which necessarily understates such lines, is to look at E911 database listings.

the FCC merger conditions – which span over 70 single-space pages, with attachments more than double that length – and despite comprehensive annual audits, SBC/Ameritech has been reported to have complied with the conditions in all material respects with only a few exceptions. Where exceptions have been noted, SBC has worked diligently to correct the matter.

We discuss below the specific allegations made by Z-Tel. But we would like to register here our strong protest against the deliberate misrepresentations in which Z-Tel so cavalierly indulges. This is not responsible advocacy. It is not even respectable advocacy, and it should not be tolerated by the Commission.

1. It is not true that, "since the approval of the merger, SBC has been subject to nearly $1,000,000,000 – yes, one billion dollars – in fines." Z-Tel Pet. at 11. This is just flat-out untrue, and the fact that Z-Tel attaches a chart that supposedly documents those fines doesn't make it any less untrue; on the contrary, it exposes just how wrong the claim is. To take just two examples, Z-Tel lists as a "fine," a $224 million *credit* given by SBC to Illinois customers for merger savings. This cannot even remotely be considered a fine, much less a fine for some sort of merger-related violation. Rather, it was ordered by the Illinois Commission as a condition of approval of the merger. Z-Tel also lists as a "fine paid by SBC" an ALJ's proposed finding in California that SBC should refund $350 million to consumers there. This refund issue, which has nothing whatsoever to do with the merger and which is being vigorously contested, has not resulted in SBC paying anything to date.

To date, there have been only two forfeitures paid by SBC for violation of the FCC merger conditions.[3] The first forfeiture, for $88,000, arose out of disputed interpretations of certain "business rules" that govern the performance data SBC reports to the Commission.[4] The Commission there concluded that SBC had, during the diagnostic period *before* SBC was subject to incentive payments, used some incorrect business rules in collecting data on a handful of the hundreds of thousands of measures and sub-measures SBC reports on a monthly basis. Even before the Commission issued the enforcement order, SBC conformed its reporting to the Commission's understanding, and it has paid the forfeiture. No CLEC entry was impeded by this problem, which dealt only with reporting, not performance.

The second forfeiture, for $84,000, was based on SBC's interpretation of the collocation posting requirement applicable to ILECs generally (but incorporated by reference into the merger conditions).[5] The Commission disagreed with the manner in which SBC was applying the requirement. SBC paid the forfeiture, and adjusted its procedures to correspond with the Commission's interpretation of the requirement. Again, there was no question of CLEC entry in any way being impeded by the failure to post a handful of offices as closed to further collocation in timely manner.

There have been no forfeitures besides these two for violations of the merger conditions. That is the case notwithstanding the fact that, over the past three years, SBC

[3] We do not here respond to allegations of violations of any merger conditions imposed by individual states. Such conditions are not before the Commission.

[4] See Order of Forfeiture, SBC Communications Inc. Apparent Liability for Forfeiture, File No. EB-00-IH-0326 (Mar. 15, 2001).

[5] See Order on Review, SBC Communications Inc. Apparent Liability for Forfeiture, File No. EB-00-IH-0326a (Feb. 25, 2002).

has existed in a fishbowl, with regular, comprehensive audits, close scrutiny by competitors, and a well-staffed, active, and diligent Enforcement Bureau.

SBC has made "voluntary performance payments" as part of a Carrier-to-Carrier Performance Plan. But, as the merger order itself made clear, these are not fines, penalties or forfeitures, and they are made in fulfillment of the merger conditions not for violations thereof. Merger Order, 14 FCC Rcd at 15046, ¶ 16 (App. C, Attach. A) ("the measurements and benchmarks under the Plan bear no necessary relationship to the standard of performance that satisfies SBC/Ameritech's legal obligations in a particular state, and payments under the Plan shall not constitute an admission by SBC/Ameritech of any violation of law or noncompliance with statutory or regulatory requirements with respect to the provision of local facilities or services to SBC/Ameritech's wholesale or retail customers").

The Carrier-to-Carrier Performance Plan is strict and comprehensive. This plan consists of a detailed set of sub-measures depending upon the state (which means that SBC must track its performance on hundreds of thousands of sub-measures every month for all CLECs[6]), and a schedule of "voluntary performance payments" to the U.S. Treasury if SBC's performance does not meet the stringent levels proposed by it in the plan. Perfection is simply not possible when dealing with such a huge array of strict measures. Yet SBC has come close. It is meeting well in excess of 90% of these measures.

The fact that SBC voluntarily agreed to make substantial payments if its wholesale performance did not meet objective standards, as an incentive to improve that

[6] This covers only the FCC merger conditions, not the many additional state requirements. When the state law requirements are added, SBC must track over *three million* sub-measures every month.

performance, is hardly evidence that SBC is ignoring its wholesale performance responsibilities. On the contrary, SBC's voluntary agreement to these plans demonstrates its commitment to meet its wholesale obligations – because SBC has specific financial incentives under the plans to do so. Although the voluntary payments were substantial at the outset in the Ameritech states, they have trended steadily downward and have reached their lowest levels in the last couple of months. This demonstrates SBC's commitment to improving its performance to CLECs and the success of the merger in importing SBC's OSS expertise into the Ameritech region.

2. SBC has not "refus[ed] to offer shared transport" in the Ameritech states. Z-Tel Pet. at 14. SBC fully implemented shared transport for local calls in the time required by the merger conditions. The only issue concerning shared transport is whether the obligation was extended, as a result of a Texas PUC decision, to intraLATA toll traffic. The Commission has issued a Notice of Apparent Liability ("NAL") on this issue. But a Notice of *Apparent* Liability is just that; it does not finally resolve the issue and no forfeiture has been paid by SBC. See 47 U.S.C. § 504(c). SBC has fully responded to the NAL on this issue. See Response of SBC Communications Inc. to Notice of Apparent Liability for Forfeiture, SBC Communications Inc. Apparent Liability for Forfeiture, File No. EB-00-IH-0326a (filed Feb. 20, 2001). Pending a final Commission decision on the issue, SBC has extended its shared transport offering to cover intraLATA toll traffic throughout the Ameritech states.

3. SBC's OSS systems are fully compliant with the merger conditions. Z-Tel contends that SBC has violated the "OSS Conditions" of the merger agreement by failing "to bring Ameritech's OSS up to snuff." Z-Tel Pet. at 17. In support of that assertion Z-

Tel relies on the fact that KPMG has still not fully approved Ameritech's OSS for purposes of section 271 relief. But the KPMG testing has nothing to do with the merger conditions and simply reflects the stringency of the application of the 271 requirements in those states (which have some of the highest levels of competitive entry in the country). Audit after audit has found that SBC has complied in all material respects with merger conditions involving OSS:

- There are various requirements that the separate advanced services affiliates use the same OSS interfaces, processes, and procedures made available by SBC incumbent LECs to unaffiliated advanced services providers. See, e.g., Merger Order, 14 FCC Rcd at 14969-71, 14978 (Conditions ¶¶ 3.a, 4.f). The audit report thus far have revealed no instances of noncompliance with these requirements.

- Advanced Services OSS Plan of Record. This was completed in October 2001 in all states except Connecticut, and in August 2002 in Connecticut. The audit reports thus far have reported that SBC has complied with this requirement in all material respects.

- Uniform and Enhanced Services OSS Plan of Record. This was completed in March and April of this year in all states except SNET, and in August of this year in SNET. The audit reports thus far have reported that SBC has complied with this requirement in all material respects.

- Access to Loop Information for Advanced Service (Condition IV). The audit reports thus far have reported that SBC has complied with this requirement in all material respects.

- Elimination of Flat-Rate OSS Charges. The audit reports thus far have reported that SBC has complied with this requirement in all material respects.

- OSS Assistance to Qualifying CLECs. The audit reports thus far have reported that SBC has complied with this requirement in all material respects.

4. SBC has fully complied with the out-of-region competitive entry requirements of the merger conditions. Z-Tel asks the Commission "to examine whether consumers

are enjoying the public interest benefits of SBC's [out-of-region] 'entry' that the Commission expected in 1999." Z-Tel Pet. at 23. But Z-Tel acknowledges that SBC has filed a letter with the Commission explaining that it has fulfilled all the requirements for out-of-region entry contained in the merger conditions. Letter of Caryn D. Moir, Vice-President, Federal Regulatory, SBC, to Marlene H. Dortch, Secretary, FCC (Aug. 21, 2002). Indeed, SBC fulfilled those requirements well in advance of the date required under the merger conditions. The deadline for meeting the last National/Local entry requirements for the final 15 MSAs is 12 months after "60 days after the date upon which SBC/Ameritech first holds valid authorization to provide originating voice and data interLATA services to at least 60 percent of all access lines (as reported under the Commission's Part 43 rules) served by SBC/Ameritech's incumbent LECs (including SNET)." See Merger Order, 14 FCC Rcd at 15027-28 (Conditions ¶ 59(b)(3), (c)(3)-(5)). SBC has not yet met the 60 percent number; accordingly, the quoted deadline has not even arrived. Yet SBC satisfied all National/Local entry requirements by August 21, 2002.

Z-Tel does not deny that SBC has satisfied those requirements. Z-Tel does not contest the showing made in SBC's August 21 compliance letter. Nor could it, since its own exhibit quotes the Assistant Bureau Chief as recognizing SBC's compliance. *See* Z-Tel Pet., Exh. F at 10 ("In fact, SBC had met the terms of its commitment to launch facilities-based local voice services in 30 markets by the second quarter of this year, says John Winston, assistant bureau chief at the FCC's Enforcement Bureau. 'They have complied,' Winston says. 'That's all I have to say on the matter.'").

Given SBC's compliance with the merger conditions, there is simply nothing more to say on the issue. The Commission cannot now conduct a hearing to decide whether the requirements in the merger conditions were sufficiently stringent or whether all the expected public benefits of compliance have been realized. SBC was required to comply with the merger conditions, and it did so.

III. EXTENSION OF THE MERGER CONDITIONS WOULD BE BAD PUBLIC POLICY AND CONTRARY TO CURRENT FCC POLICY

The current Chairman of the FCC has made it quite clear that the use of a detailed set of merger conditions covering an array of topics as a way to counterbalance perceived harms from a merger is a thing of the past.

> My criticisms of FCC merger review at the hearing (and in my prior statements) centered on my concern that an informal, bilateral process is being employed to develop "voluntary" conditions. Such conditions, I maintain, in essence are surrogate policies and rules that should be developed through the formal rule-making process, which affords fuller opportunity for interested parties to comment. The "voluntary" conditions process has been one that lacks the wider input and more extensive deliberation associated with rule-makings and may allow our actions to evade judicial review.

Michael Powell, *Letters to the Editor*, Electronic Media, Apr. 10, 2000, at 9.

"Our merger 'conditions,'" he has explained, "more often look like rules, reflecting judgments that, if true, affect the entire industry and not just the parties. As such, they should be entertained, if at all, in a broader-based proceeding." Statement of Commissioner Michael K. Powell, Concurring in Part and Dissenting in Part, *attached to* Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee*, CS Docket No. 00-30 (rel. June 5, 2000). Instead of developing company-specific rules, in the limited context of any adjudicatory proceeding,

"the FCC's focus should be on compliance with the current regulatory regime and a forward-looking focus on the appropriate regulatory treatment of the industry *as a whole*." *Id.*

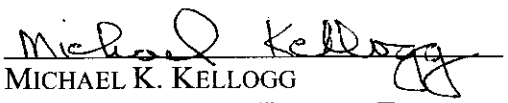
Chairman Powell elaborated on these views in a Statement before the House Committee on Commerce, Subcommittee on Telecommunications and Consumer Protection on the Telecommunications Merger Act of 2000 (Mar. 14, 2000). He gave four reasons why it is "a profound mistake to use license transfer proceedings as a way to advance policies of general applicability that are otherwise, and more appropriately, the subject of rulemakings."

First, a merger review involves negotiations between the government and the applicants and, as such, is unsuited "to broach broader policy questions," which are more properly handled in a rulemaking proceeding. Second, "by importing parts of rulemakings and transforming them into merger conditions, we risk substantially confusing both the industry and state commissions with respect to rules previously adopted." Third, the Commission should not be "essentially promulgating rules without the deliberative process of notice and comment normally afforded in a comprehensive rulemaking," particularly since such a process is "insulated from judicial review" by the supposedly "voluntary" nature of the commitments. Finally, Chairman Powell criticized "an essential assumption of this process, that is, the idea that a regulated entity can 'voluntarily' offer and commit to broad-ranging legal obligations and penalties."

These carefully thought out, and solidly reasoned, views might not provide a basis for eliminating merger commitments already in place. But they certainly provide ample reason why, even if it had the authority to do so and even if there was a factual basis to

do so (which there is not), the Commission should not seek to extend merger conditions that have been implemented in good faith and which, by prior agreement between the parties, are set to expire.

Respectfully submitted,



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September 13, 2002

CERTIFICATE OF SERVICE

I hereby certify that, on this 13th day of September 2002, I caused copies of the foregoing *Opposition of SBC Communications Inc. to Z-Tel's Petition to Extend Merger Conditions* to be served upon the parties on the attached service list by first-class mail, postage prepaid.

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